

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
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<b>INTERMART BROADCASTING</b>	)	File No. BPH-19970724M1
<b>POCATELLO, INC.</b>	)	Facility ID No. 87656
	)	
For a New FM Broadcast Station	)	
at Pocatello, Idaho	)	
	)	
<b>INTERMART BROADCASTING</b>	)	File No. BPH-19970731MX
<b>TWIN FALLS, INC.</b>	)	Facility ID No. 87843
	)	
For a New FM Broadcast Station	)	
at Twin Falls, Idaho	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 11, 2008**

**Released: May 22, 2008**

By the Commission: Commissioner Copps concurring and issuing a statement.

1. We have before us two Applications for Review related to Closed Broadcast Auction No. 25, held during September and October 1999: (1) by Idaho Wireless Corporation ("IWC"), an applicant for a new FM broadcast station at Pocatello, Idaho,<sup>1</sup> and (2) by Astounding Productions, Inc. ("Astounding"), an applicant for a new FM broadcast station at Twin Falls, Idaho.<sup>2</sup> We also have before us a Petition for Reconsideration filed by IWC of the grant of the InterMart Pocatello application.<sup>3</sup> IWC was the second-highest bidder for the Pocatello construction permit in mutually exclusive ("MX") Group FM 39, losing to InterMart Broadcasting Pocatello, Inc. ("InterMart Pocatello"). Astounding was the second-highest bidder for the Twin Falls construction permit in MX Group FM 41, losing to InterMart Broadcasting Twin Falls, Inc. ("InterMart Twin Falls"). IWC seeks review of the Media Bureau's ("Bureau") decision<sup>4</sup> to deny IWC's Petition to Deny and grant the InterMart Pocatello application, while Astounding seeks review of the Bureau's decision to deny Astounding's Informal Objection and grant the

<sup>1</sup> Application for Review filed May 19, 2003, by Idaho Wireless Corporation. File No. BPH-19970724M3.

<sup>2</sup> Application for Review filed May 19, 2003, by Astounding Productions, Inc. Astounding participated in Auction No. 25 under the name AM 1270 Co. File No. BPH-19970728MG.

<sup>3</sup> IWC filed its Petition for Reconsideration on June 12, 2003. *See infra* note 13.

<sup>4</sup> IWC seeks review of the Bureau's April 4, 2003, decision, *Letter to Peter Tannenwald, Esq., Marissa G. Repp, Esq., and Lauren A. Colby, Esq.*, Ref. No. 1800B3-TSN (MB Apr. 4, 2003) ("Pocatello Reconsideration Decision"), denying reconsideration of the staff's June 27, 2000, denial of IWC's Petition to Deny the InterMart Pocatello application. *Letter to Gary S. Smithwick, Esq., and Peter Tannenwald, Esq.*, Ref. No. 1800B3-JAM (MMB Jun. 27, 2000) ("Pocatello Staff Decision").

InterMart Twin Falls application.<sup>5</sup> Because IWC and Astounding raise substantially identical issues on review against InterMart Pocatello and InterMart Twin Falls,<sup>6</sup> we consolidate the two proceedings.<sup>7</sup> For the reasons discussed below, we deny the Applications for Review and dismiss the Petition for Reconsideration.

## I. BACKGROUND

2. InterMart, IWC, and Astounding participated in Closed Broadcast Auction No. 25.<sup>8</sup> Auction No. 25 was “closed” in that only those applicants with timely-filed Form 301 applications were eligible to participate in the auction.<sup>9</sup> InterMart Pocatello entered the high bid of \$955,000 for the Pocatello FM construction permit, and timely made its down payment. After InterMart Pocatello amended its Form 301 application, IWC filed a Petition to Deny the InterMart Pocatello application, claiming that various agreements between InterMart and Citicasters Co. (“Citicasters”) raised a substantial and material question of fact as to whether Citicasters was the real party in interest behind InterMart Pocatello’s application. Before the auction, InterMart Pocatello and Citicasters entered into a series of agreements regarding the to-be-auctioned Pocatello FM construction permit: a Loan Agreement, Promissory Note, Pledge Agreement, Security Agreement, and Right of First Refusal and Put Agreement.<sup>10</sup> InterMart Pocatello disclosed the existence of these agreements, stating that they were

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<sup>5</sup> Astounding seeks review of the staff’s April 4, 2003, denial of its April 4, 2000, Informal Objection against the InterMart Twin Falls application (“Twins Falls Staff Decision”). See *Letter to Harry C. Martin, Esq., Marissa G. Repp, Esq., and Lauren A. Colby, Esq.*, Ref. No. 1800B3-TSN (MB Apr. 4, 2003).

<sup>6</sup> At footnote 2 of its Application for Review, Astounding notes the IWC Application for Review regarding InterMart Pocatello and states that “any arguments contained in that Application for Review with regard to the financial and other arrangements with Citicasters would be equally applicable in the instant proceeding.” InterMart Pocatello and InterMart Twin Falls have identical shareholders, officers and directors. Moreover, the set of agreements entered into by each such InterMart entity with Citicasters involving the subject auction for FM stations in Pocatello and Twin Falls, respectively, that are the subject of this Order are virtually identical. In light of the commonalities of the parties, the agreements and the arguments made by IWC and Astounding, for purposes of simplicity, InterMart Pocatello and InterMart Twin Falls will sometimes be collectively referred to herein as “InterMart.”

<sup>7</sup> InterMart filed a Consolidated Opposition to the Applications for Review on June 2, 2003 (“Consolidated Opposition”). IWC filed a Reply on June 12, 2003, as did Astounding. InterMart objects to the Applications for Review on procedural grounds, claiming that neither of the documents complies with the requirements of 47 C.F.R. § 1.115(b). We agree with Astounding that, while the documents do not contain the precise subheadings or numeration as outlined in the rule, the content required is covered in the pleadings. We will accordingly consider the Applications for Review on their merits.

<sup>8</sup> InterMart Pocatello submitted amendments to its Pocatello application on August 1, 1997, November 12, 1999, and March 10, 2000. InterMart Pocatello also submitted a FCC Form 175, Application to Participate in an FCC Auction, in August 1999, and amended its Form 175 application in September 1999. InterMart Twin Falls submitted amendments to its Twin Falls application on August 25, 1997, November 12, 1999, and March 15 and May 31, 2000. InterMart Twin Falls also submitted a FCC Form 175 application in August 1999, and amended it in September 1999.

<sup>9</sup> *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15959-60 (1998) (“*Broadcast First Report and Order*”), recon. denied, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), modified, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

<sup>10</sup> The corresponding agreements between Citicasters and the two InterMart bidders were executed and amended at the same time. Thus, each Loan Agreement was executed on August 20, 1999. Amendment No. 1 to Loan Agreement was dated October 26, 1999. Amendment No. 2 to Loan Agreement was dated March 6, 2000.

(continued....)

executed in exchange for a loan from Citicasters to enable InterMart to participate in the auction.<sup>11</sup> InterMart Pocatello reported that it also contemplated entering into a Joint Sales Agreement (“JSA”) with Citicasters.<sup>12</sup> IWC contends that through these agreements InterMart Pocatello ceded bidding control to Citicasters. InterMart Pocatello responds that it has always been the applicant and the real party in interest behind the application, that it was the auction bidder, and that its principals have always had both *de jure* and *de facto* control of InterMart Pocatello and the proposed station. The staff found no evidence that Citicasters controlled InterMart Pocatello’s auction bidding, and denied the Petition to Deny. IWC filed a Petition for Reconsideration, arguing that the Bureau failed to focus on the totality of the agreements between InterMart Pocatello and Citicasters, instead addressing the various agreements separately. The Bureau found otherwise, pointing to language in the Pocatello Staff Decision indicating that the staff had considered the agreements both separately and cumulatively, and denied reconsideration. IWC’s Application for Review followed.<sup>13</sup>

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Amendment No. 3 to Loan Agreement was dated August 20, 2001. Amendment No. 4 to Loan Agreement was dated December 31, 2002. Amendment No. 5 to Loan Agreement was dated December 31, 2003.

The Right of First Refusal and Put Agreement was executed on August 20, 1999. Amendment No. 1 to Right of First Refusal and Put Agreement was dated March 6, 2000. Amendment No. 2 to Right of First Refusal and Put Agreement was dated June 30, 2001. Amendment No. 3 to Right of First Refusal and Put Agreement was dated December 31, 2002. Amendment No. 4 to Right of First Refusal and Put Agreement was dated December 31, 2003.

The Loan Agreement, the Promissory Note, the Pledge and Security Agreements, and the Right of First Refusal and Put Agreement were executed on August 20, 1999, prior to the auction. Following the auction, on March 10, 2000, InterMart Pocatello filed copies of the Loan Agreement and Promissory Note, as amended on October 26, 1999, and March 6, 2000, as well as a copy of the Right of First Refusal and Put Agreement, as amended on March 6, 2000. It did so at the Bureau’s request. *Letter to Gary S. Smithwick, Esq.*, Ref. No. 1800B3-JAM (MB Feb. 29, 2000).

<sup>11</sup> See InterMart Pocatello FCC Form 175, Exhibit B, filed August 20, 1999. In addition to the documents listed in the text, all dated August 20, 1999, on March 10, 2000, InterMart Pocatello also submitted copies of an Amendment No. 1 to Loan Agreement, and an Amended and Restated Promissory Note, both dated October 26, 1999, as well as an Amendment No. 2 to Loan Agreement, an Amended and Restated Promissory Note, and an Amendment No. 1 to Right of First Refusal and Put Agreement, all dated March 2000.

<sup>12</sup> See InterMart Pocatello FCC Form 175, Exhibit B, filed August 20, 1999. See also InterMart Pocatello FCC Form 175, Exhibit B, amended September 1999. In its November 12, 1999, amendment to the Pocatello Form 301 application, InterMart Pocatello reported that it had entered into a JSA with Citicasters. However, in the March 10, 2000, amendment to its Pocatello application, InterMart Pocatello stated that it and Citicasters only “contemplate” entering into a JSA. “There was no deeper meaning in the choice of the word ‘contemplated’ except to denote that the agreement was executory,” states InterMart in its April 19, 2000, Opposition to Informal Objection. Section 6.4 of the August 20, 1999, Loan Agreement included a provision that InterMart “covenants and agrees to enter into the JSA with the Lender within five days’ [sic] following notice by the Lender that it desires to enter into the JSA” and the JSA, attached as Exhibit D to the original Loan Agreement, is neither dated nor signed. An executed JSA has never been submitted to the Commission.

<sup>13</sup> Following full and timely payment of the winning bid, the staff granted InterMart’s Pocatello construction permit application on May 19, 2003. The facility was assigned call sign KPPC(FM). In its June 12, 2003, Petition for Reconsideration, IWC claimed that the Bureau’s grant of InterMart Pocatello’s application, while IWC’s Application for Review was still under consideration, prejudiced IWC’s right to pursue its legal remedies. Grant of the InterMart Pocatello application is, and always has been, subject to the Commission’s ultimate determination regarding IWC’s basic challenge to the application. See *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732 (D.C. Cir. 1976) (every grant of a license is subject to the limitations of the Act, including the right to judicial review and obligation to give effect to any resulting judgment). Because, in this Order, we resolve that challenge in InterMart’s favor, we dismiss IWC’s June 12, 2003, Petition for Reconsideration.

3. InterMart Twin Falls entered the high bid of \$838,000 for the Twin Falls FM construction permit, and timely made its down payment. Astounding filed its April 4, 2000, Informal Objection, alleging that the series of agreements between InterMart Twin Falls and Citicasters regarding the Twin Falls permit, similar to the Pocatello agreements discussed above, raises a substantial and material question of fact as to whether Citicasters was the real party in interest behind the InterMart Twin Falls application.<sup>14</sup> The staff denied Astounding's Informal Objection, also rejecting its suggestion that the Citicasters loan raised a presumption of transfer of control under the Equity Debt Plus rule.<sup>15</sup> Astounding sought review.<sup>16</sup>

## II. DISCUSSION

4. As discussed below, we conclude that IWC and Astounding have not raised a substantial and material question of fact that Citicasters was the real party in interest behind InterMart's auction applications or in the auction. IWC, for its part, erroneously relies on an inapplicable statutory provision in support of its argument. Additionally, the fact that InterMart fully disclosed its arrangements with Citicasters throughout the auction contravenes IWC and Astounding's real party in interest claim, which hinges upon nondisclosure. Further, IWC and Astounding's construal of loan renegotiations between InterMart and Citicasters during the auction does not support their contention that Citicasters controlled the bidding process. Likewise, we reject IWC and Astounding's contention that the structure of the various InterMart-Citicasters agreements confirms that Citicasters was the real party in interest, and find that the business arrangements fully comply with all Commission requirements. For these reasons, we deny the Applications for Review.

5. *Section 309(l)*. On review, IWC again contends that Citicasters, not InterMart, controlled InterMart's bids for the Pocatello construction permit, and thus impermissibly participated in Closed Broadcast Auction No. 25 in violation of Section 309(l)(2) of the Communications Act of 1934, as amended.<sup>17</sup> At the outset, we note that IWC's reliance on the statutory provision is misplaced.<sup>18</sup> By its express terms, Section 309(l) applies to "competing applications for . . . construction permits for

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<sup>14</sup> InterMart Twin Falls also disclosed the existence of these agreements in its Form 175. Copies of the InterMart – Citicasters Twin Falls agreements were provided by InterMart Twin Falls on April 6, 2000, at the Bureau's request. *Letter to Gary S. Smithwick, Esq.*, Ref. No. 1800B3-JAM (MB Mar. 28, 2000). With the exception of the loan amount, each of the various agreements is substantially identical to the agreements submitted in connection with the Pocatello application. Each Twin Falls agreement and amendment bears the same execution date as its Pocatello counterpart.

<sup>15</sup> See April 4, 2003, Twin Falls Staff Decision. The staff correctly determined that Citicasters was in compliance with the radio multiple ownership rule in the Twin Falls market, even after attributing its interest under the Equity Debt Plus ("EDP") rule. 47 C.F.R. § 73.3555, Note 2(i). The EDP argument was not further pursued on appeal.

<sup>16</sup> Astounding Application for Review. Following full and timely payment of the winning bid, the staff granted the InterMart Twin Falls construction permit application on May 19, 2003. A license to cover the construction permit was granted on January 6, 2006 (File No. BLH-20041119ADY), and the station now operates under call sign KSNQ(FM).

<sup>17</sup> 47 U.S.C. § 309(l)(2).

<sup>18</sup> In its June 12, 2003, Reply, IWC concedes that, because "Auction 25 (sic) was not subject to Section 309(l)(2) by the terms of that provision," we "stand corrected on that point." IWC Reply at 6.

commercial radio or television stations that were filed with the Commission before July 1, 1997.”<sup>19</sup> In the instant case, all of the relevant applications were filed after July 1, 1997.<sup>20</sup>

6. IWC and Astounding also contend that InterMart made arrangements that, in effect, improperly constituted a sale of its right to bid in the closed auction to Citicasters. First, IWC and Astounding argue that Citicasters made all key decisions at the auction.<sup>21</sup> Second, IWC and Astounding claim that, based on the structure of the various InterMart-Citicasters agreements, InterMart has no reasonable alternative but to sell each station to Citicasters to avoid untenable financial circumstances after the auction.<sup>22</sup>

7. *Auction Application and Bidding Process.* Section 1.115 of the Commission's Rules establishes that “[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.”<sup>23</sup> The rule further provides that the Application for Review shall specify “the factor(s) which warrant Commission consideration of the questions presented [such as]: (i) the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”<sup>24</sup> For the reasons described below, neither IWC nor Astounding has shown that the Bureau’s actions in these cases is inconsistent with statute, regulation, case precedent, or established Commission policy, and thus, we deny their Applications for Review. It is well established that the Commission will designate a real party in interest issue against an applicant if it is demonstrated that a person has an undisclosed ownership interest, or is or will be in a position to actually or potentially control the operation of a station.<sup>25</sup> These issues are fact specific and must be considered on a case-by-case basis.

8. IWC and Astounding argue that Citicasters is the real party in interest to the auction application and, therefore, illegally participated in the closed broadcast auction. We disagree. As an initial matter, we note that failure to disclose the true principals of an applicant is a fundamental

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<sup>19</sup> 47 U.S.C. § 309(l).

<sup>20</sup> The filing period for applications for Channel 221A, Pocatello, Idaho ended July 24, 1997. *See Pocatello, Idaho*, Report and Order, 12 FCC Rcd 5949 (MMB 1997). Both IWC and InterMart filed their Pocatello applications on July 24, 1997. The filing period for applications for Channel 252C1, Twin Falls, Idaho ended July 31, 1997. *See Twin Falls, Idaho*, Report and Order, 12 FCC Rcd 6068 (MMB 1997). Astounding filed its Twin Falls application on July 28, 1997. InterMart filed its Twin Falls application on July 31, 1997.

<sup>21</sup> IWC contends that Citicasters determined the amount of its loans to InterMart to be used exclusively for bidding on the FM construction permits, and therefore, “determined the amount that could be bid for the license.” IWC Application for Review at 4.

<sup>22</sup> IWC thus contends that, through these agreements, InterMart “sold the right to bid at the auction to Citicasters.” *Id.*

<sup>23</sup> 47 C.F.R. § 1.115(a).

<sup>24</sup> 47 C.F.R. § 1.115(b)(2)(i).

<sup>25</sup> *KOWL, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 962, 964 (Rev. Bd. 1974); *Creek County Broadcasting Co.*, Memorandum Opinion and Order, 31 FCC 2d 462, 467 (Rev. Bd. 1971); *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712, 716 (D.C. Cir. 1958). The phrase “real party in interest” usually applies to parties to pending applications, while “*de facto* control” is applied to parties controlling outstanding authorizations. *Univision Holdings*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6675, n.12 (1992), *recon. dismissed*, Memorandum Opinion and Order, 8 FCC Rcd 3931 (1993).



component of our real party in interest analysis.<sup>26</sup> Both the potential for deception and the failure to submit material information can undermine the Commission's essential licensing functions.<sup>27</sup> Here, however, InterMart fully complied with its disclosure obligations.<sup>28</sup> In its original and amended Form 175 applications, InterMart disclosed that Citicasters would loan it funds for the purpose of participating in the auction, and had executed loan documents and related agreements for this purpose. These included agreements giving Citicasters a right of first refusal to purchase each station and requiring Citicasters, at InterMart's option, to purchase it.<sup>29</sup> In the Form 175 applications, InterMart specifically certified that it was "the real party in interest in this application and that there are no agreements or understandings other than those specified in this application, which provide that someone other than the applicant shall have an interest in the license."<sup>30</sup> Furthermore, all of the aforementioned agreements between InterMart and Citicasters were not only voluntarily disclosed to the Commission, but copies were immediately produced upon staff request. Subsequent amendments were likewise voluntarily provided by InterMart throughout the course of this proceeding.<sup>31</sup> The parties have not attempted to conceal or misrepresent the nature of the relationship between InterMart and Citicasters. On these facts, we conclude that IWC and Astounding have failed to raise a *prima facie* case that InterMart engaged in any deceptive practices at the application phase of the auction process.

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<sup>26</sup> *Lowrey Communications, L.P.*, Decision, 7 FCC Rcd 7139, 7147 (Rev. Bd. 1992) ("regulatory sin embedded in [a real party in interest] issue is the failure to disclose the true 'owners,' information the Commission must have for a panoply of administrative purposes; e.g., multiple ownership rules, character concerns, alien ownership limitations, and ultimate responsibility for overall FCC license obligations"), *aff'd*, Memorandum Opinion and Order, 8 FCC Rcd 6721(1993), *vacated and remanded per curiam*, No. 93-1690, 1994 WL 475076 (D.C. Cir. 1994). *See also Arnold L. Chase*, Decision, 5 FCC Rcd 1642, 1648, n.5 (1990) (concern in a real party in interest inquiry is whether an applicant is, or will be, controlled in a manner that differs from the proposal before the Commission).

<sup>27</sup> *See Fenwick Island Broadcast Limited Partnership I*, Decision, 7 FCC Rcd 2978, 2979 (Rev. Bd. 1992) ("A real party in interest issue, by its very nature, is a basic qualifying issue in which the element of deception is necessarily subsumed."). *See also Lowrey Communications, L.P.*, 7 FCC Rcd at 7147 (*sine qua non* of a real party in interest issue is a showing that a party not named as a principal holds either an undisclosed ownership interest or the functional equivalent thereof).

<sup>28</sup> For Closed Broadcast Auction No. 25, the Commission released a Public Notice clarifying the ownership disclosure requirements for Form 175 applications. *See Closed Broadcast Auctions, Ownership Disclosure Requirements for Auctions Scheduled for September 28, 1999*, Public Notice, 14 FCC Rcd 13283 (WTB/MMB 1999). At the time of Closed Broadcast Auction No. 25, 47 C.F.R. § 1.2112(a)(4)(1999) required auction applicants to list "any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentages held." The Commission specifically rejected the view that the closed nature of the first broadcast auction required the adoption of special disclosure requirements to ensure against the participation of new parties or investors. *Broadcast First Report and Order*, 13 FCC Rcd at 15942. In the *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15300 (2000), the Commission later modified the rule and stated it would no longer require applicants to include information regarding stock options as part of the 10 percent reporting requirement unless and until conversion is effected.

<sup>29</sup> Form 175 and 47 C.F.R. § 1.2105(a)(2)(viii) require auction applicants to identify "all parties with whom the applicant has entered into . . . agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such arrangements relating to the post-auction market structure." The requirement was instituted to safeguard both the competitiveness of the auction process and of the post-auction market structure, and to facilitate the detection of collusive conduct. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2387-88 (1994).

<sup>30</sup> InterMart Forms 175, Certification No. (2).

<sup>31</sup> *See supra* notes 8, 10, 11 and 12.

9. We reject as speculative and unsupported IWC's and Astounding's contention that Citicasters controlled the InterMart bidding process. The basic facts are not in dispute. Originally, InterMart Pocatello secured a loan of \$400,000 from Citicasters, which InterMart Pocatello was to use exclusively for bidding on the Pocatello construction permit in Auction No. 25. Subsequently, the loan amount was increased to \$955,000, the amount of InterMart Pocatello's winning bid, and this was reduced to writing on October 26, 1999.<sup>32</sup> InterMart Twin Falls also secured a loan of \$400,000 from Citicasters, which it was to use exclusively for bidding on the Twin Falls construction permit. This loan amount was increased to \$838,000, the amount of the InterMart Twin Falls winning bid, and this was also reduced to writing on October 26, 1999.<sup>33</sup> Thus, it appears that InterMart and Citicasters negotiated the loan increases during or shortly after the close of the auction.<sup>34</sup> Bidders with pre-auction financing arrangements are permitted, as InterMart did here, to renegotiate the loan agreements and execute amendments during or after the close of an auction.

10. We find unpersuasive IWC's and Astounding's contentions that Citicasters established a maximum loan amount for each permit and, therefore, controlled the bidding. Neither IWC nor Astounding has presented any evidence of Citicasters' control, just relying on the fact that InterMart was able to increase its loan amount from Citicasters during (or shortly thereafter) the auction. That InterMart and Citicasters renegotiated the loans does not, of itself, advance the argument. Indeed, the loan renegotiation can reasonably be viewed as refuting IWC's and Astounding's conclusion. When bidding on the Pocatello and Twin Falls FM construction permits exceeded each \$400,000 loan amount, InterMart might have decided to discontinue bidding. Conversely, Citicasters might have declined to enter into negotiations with InterMart to increase the loan amounts. The record only shows that the parties agreed to an increase in the loans sufficient to cover InterMart's winning bids. There is no evidence that the increased bid amounts were "imposed" by Citicasters, or that Citicasters was in any way directly involved in the bidding process.<sup>35</sup> Contrary to IWC's and Astounding's assertions, there is no evidence that the increase in the loan amounts was the result of anything other than *bona fide* arms' length negotiations between InterMart and Citicasters.

11. InterMart specifically denies IWC's and Astounding's allegations.<sup>36</sup> An InterMart officer states that she personally did all of the preparatory work for the auction, including obtaining special bidding software from the Commission and installing the programming on a computer in the InterMart Florida office.<sup>37</sup> Once the bidding began, the officer had decisional authority over all of InterMart's bids

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<sup>32</sup> See Amendment No. 1 to (Pocatello) Loan Agreement, dated October 26, 1999.

<sup>33</sup> See Amendment No. 1 to (Twin Falls) Loan Agreement, dated October 26, 1999.

<sup>34</sup> The auction concluded on October 8, 1999. See *Closed Broadcast Auction No. 25 Closes – 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits*, Public Notice, 14 FCC Rcd 17186 (WTB/MMB 1999).

<sup>35</sup> To bolster its argument, IWC points to language in paragraph 2(b) of the Right of First Refusal and Put Agreement referring to "[t]he maximum bid established by Citicasters," to show that the parties understood that Citicasters rather than InterMart would determine how much to pay for the Pocatello license. As correctly noted in the Pocatello Staff Decision, this language is only included in the Right of First Refusal and Put Agreement, and simply describes the potential consideration to be paid by Citicasters if InterMart exercises the put.

<sup>36</sup> Declaration of Patricia S. Woods, Secretary and Treasurer of InterMart, dated May 30, 2003, Attachment A to Consolidated Opposition, at 2.

<sup>37</sup> *Id.*

in the auction.<sup>38</sup> In addition, the Commission requires all auction applicants to identify authorized bidders. In its Form 175 applications for the two FM facilities, InterMart certified that: (a) James E. Martin, Jr., its President and 50 percent stockholder, (b) Patricia S. Dahlin, its Vice President, Secretary and Treasurer,<sup>39</sup> and (c) Gary S. Smithwick, its other contact person, were the only persons authorized to make or withdraw a bid for the auction applicants.<sup>40</sup>

12. The Commission does not preclude the funding of auction participation by nonparty investors. Only a change in the control of an applicant would have rendered InterMart ineligible to participate in the closed auction.<sup>41</sup> As the Commission stated in *Liberty Productions*, “Neither the statute nor the Commission’s implementing rules, however, precludes applicants from borrowing money from a bank or another lender in order to participate in the auction.”<sup>42</sup> The decision to resort to outside financing to support an auction bid is, ultimately, a business decision. We have held that we will not second-guess an applicant’s good faith business judgment absent evidence that the business decision is being used to perpetrate a sham.<sup>43</sup> The financing arrangement between Citicasters and InterMart does not support IWC’s and Astounding’s allegation of a sham.

13. *The Collective Agreements.* Similarly, IWC and Astounding would have us read the InterMart-Citicasters agreements to confirm their conclusion that Citicasters was the real party in interest behind InterMart’s applications and auction bids, IWC stating that the agreements “plainly were

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<sup>38</sup> “InterMart controlled the bidding process, was responsible for the bid amounts and made the final decisions as to how much to bid for each of these permits . . . Citicasters’ concurrence in InterMart’s bid amounts was not necessary – InterMart was free under its loan agreement with Citicasters to use InterMart’s own resources to bid higher amounts at the auction than Citicasters would loan . . . Moreover, since InterMart, not Citicasters, was in control of the bidding and InterMart would be liable for the winning bids, I would not have bid more for a permit than InterMart believed such permit was worth, even if Citicasters would have been willing to loan InterMart additional funds. In sum, InterMart was in charge of and made the final bidding decisions in the auction of the Pocatello and Twin Falls permits.” *Id.*

<sup>39</sup> Patricia S. Dahlin was Woods’ name prior to marriage.

<sup>40</sup> See InterMart FCC Forms 175, Item 12 (1999 version).

<sup>41</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15942 (consistent with Part 1 rules providing that a short form application is considered newly filed if it is amended by a major amendment (*see* 47 C.F.R. § 1.2105(b)(2)), a change in the control of an application otherwise subject to Section 309(l) would render the existing applicant ineligible to participate in an auction that is statutorily limited to pre-July 1 applicants).

<sup>42</sup> *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12073 (2001) (“*Liberty Productions*”), *stay denied*, Order, 16 FCC Rcd 18966 (2001), *aff’d sub nom., Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 981 (2003) (Cumulus’s funding of Liberty’s participation in the auction was not inconsistent with Section 309(l) and did not raise a substantial and material question of fact that Cumulus had an ownership interest in Liberty). See also *Medford Broadcasters, Inc.*, Memorandum Opinion and Order, 16 FCC2d 684 (Rev. Bd. 1969) (supplying major source of financing does not necessarily cause third party to become a real party in interest). Moreover, in *Liberty Productions*, the Commission determined that the submission of the loan agreement was not even required under 47 C.F.R. § 1.2112(a)(4)(1999) unless Cumulus had an ownership interest, or an option to acquire an ownership interest in Liberty. 16 FCC Rcd at 12073-74.

<sup>43</sup> *Victory Media, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 2073, 2075 (1988), *overruled on other grounds, Coast TV*, Memorandum Opinion and Order, 5 FCC Rcd 2751, 2752 (1990), *disavowed on other grounds, Poughkeepsie Broadcasting Limited*, Memorandum Opinion and Order, 6 FCC Rcd 2497, n.2 (1991) (limiting Commission’s review of an applicant’s business decisions to matters that relate to bona fides of applicant’s ownership structure).



negotiated so that it made no economic sense for InterMart to do anything other than to sell the station to Citicasters.”<sup>44</sup> Again, however, the record simply does not support IWC’s and Astounding’s speculative conclusions.

14. IWC asserts that the various agreements are structured in such a way as to ensure “that InterMart cannot operate the station profitably,”<sup>45</sup> thus effectively compelling a sale to Citicasters, and confirming that Citicasters was the real party in interest in the auction.<sup>46</sup> These assertions are not supported by the record. Although the Loan Agreement did provide for a significant increase in the interest rate on the loan after grant of the construction permit to InterMart, nothing prevented InterMart from seeking new financing if the loan terms were unfavorable. Thus, even if we were to assume that the loan agreement was structured in a way to ensure that InterMart could not operate the station profitably, nothing in the various agreements prohibits InterMart from seeking to refinance each loan with another lender on more favorable terms.<sup>47</sup> Moreover, we note that, as IWC concedes, the January 12, 2004, amendments to the loan agreements<sup>48</sup> cured the allegedly problematic terms in the original agreements.<sup>49</sup> Specifically, the allegedly confiscatory loan terms were “lowered to reflect current market rates.”<sup>50</sup>

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<sup>44</sup> IWC Application for Review at 13.

<sup>45</sup> IWC Application for Review at 15. *See also* Astounding Application for Review at 4.

<sup>46</sup> As originally executed, the agreements set an interest rate on the loan at one percent over the Prime Rate, which in August 1999 was nine percent, but was to increase to 18 percent 30 days after the Commission granted the construction permit to InterMart. In March 2000, the parties amended the 18 percent interest rate increase date to provide that such interest increase does not apply until 90 days after the station begins program test authority. In December 2003, the interest rate was again modified to one percent over prime.

<sup>47</sup> For example, the Loan Agreements each provided that the loan may be prepaid “without premium or penalty” at any time prior to its due date. Loan Agreement § 2.6 Prepayment.

<sup>48</sup> As previously noted, the Loan Agreements have been amended five times, and all corresponding due dates extended. The most recent set of revised documents memorializing both the Pocatello and Twin Falls InterMart-Citicasters arrangements were submitted to the Commission January 12, 2004. With respect to the Pocatello construction permit, included among those documents is Amendment No. 5 to Loan Agreement, and an Amended and Restated Promissory Note, dated December 31, 2003, in the new principal amount of \$1,155,000. The additional \$200,000 of the loan is authorized by Citicasters for use in constructing the new station. The new interest rate on the loan is one percent over prime. Also included among the new documents is the LMA, dated December 31, 2003, and Amendment No. 4 to Right of First Refusal and Put Agreement, where consideration for the put was most recently modified, § 2. With respect to the Twin Falls construction permit, included among the documents is Amendment No. 5 to Loan Agreement, and an Amended and Restated Promissory Note, dated December 31, 2003, in the new principal amount of \$988,000. Also included is an LMA, dated December 31, 2003, and an Amendment No. 4 to Right of First Refusal and Put Agreement.

<sup>49</sup> The maturity date has been extended with each corresponding amendment to the Loan Agreement, thus arguing against the allegation of an atypically short repayment period. This term of the Loan Agreement was most recently modified in a December 15, 2006 Letter Agreement between Citicasters and InterMart. Section 2.3 currently reads: “The Loan shall mature . . . upon the earlier of (i) the sale or transfer of . . . the assets of the Borrower, (ii) December 31, 2008, provided that the Station commences operations pursuant to program test authority under the Permit on or before December 15, 2007, . . . or (iii) December 31, 2007, if the Station had not commenced operations pursuant to program test authority under the Permit . . . on or before the permit expiration date.”

<sup>50</sup> Declaration of Patricia S. Woods, attachment to February 20, 2004, Response to Comments on InterMart’s Amendment, at 2 (“February 20, 2004 Woods Declaration”). During the period of operation under the LMA no interest will accrue. InterMart remains obligated for interest accrued before and after the LMA period. While IWC argues that an interest-free period is unrealistic, InterMart counters that “the interest-free period during the LMA was a condition set by InterMart as consideration for its agreement to enter into the LMA.” *Id.* As noted in the text,

(continued....)

Second, each unexecuted JSA was replaced with an executed Local Programming and Marketing Agreement (“LMA”) that specifies the fees to be paid to InterMart by Citicasters.<sup>51</sup> Finally, for the reasons stated above, we reject IWC’s and Astounding’s attempts to fabricate a real party in interest issue out of these arms’ length negotiations between InterMart and Citicasters.

15. Second, IWC’s and Astounding’s real party in interest argument must fail because it is predicated on the assumption that each set of InterMart-Citicasters agreements will compel a station sale to Citicasters. As a preliminary matter, the Commission’s auction rules do not prohibit applicants from entering into option agreements with unrelated parties. Importantly, the Commission does not treat such interests as attributable, much less an indicia of *de facto* control.<sup>52</sup> Moreover, under the agreements, InterMart has absolute control over whether it sells or retains each station. Citicasters cannot compel InterMart to sell the stations or prevent such a sale; the decision whether to sell is InterMart’s.<sup>53</sup> We note that InterMart retains numerous alternatives notwithstanding these agreements. It could pay off each loan from Citicasters at any time.<sup>54</sup> It could then choose to refinance each loan with a different lender or use its own funds in lieu of the loan. While under such a scenario InterMart is bound to each LMA, this does not necessarily inure to InterMart’s disadvantage.<sup>55</sup> It would be reasonable to suggest that InterMart has

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we find no difficulty with the original loan documents. Therefore, we decline to construe the subsequent amendments as a concession that the previously proposed loan arrangement was atypical or defective.

<sup>51</sup> The January 12, 2004, amendments to the documents included an LMA to replace each unexecuted August 1999 JSA. The LMA provided that Citicasters would make a one-time execution payment to InterMart of \$30,500; a \$3,000 monthly payment plus reimbursement of reasonable employee and transmitter expenses; and an annual profit share payment of five percent.

<sup>52</sup> Our rules make clear that a mere option to acquire a station does not convey control. See 47 C.F.R. § 73.3555, Note 2, paragraph (e) (holders of options not attributed unless and until conversion is effected). Furthermore, it is well settled that contractual rights of first refusal and put options alone do not result in a transfer of control. *Manahawkin Communications Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 342, 348 (2001) (citing *M&M Broadcasting Co.*, Initial Decision, 17 RR 1215, 1252 (I.D. 1958)); *Atlantic Coast Broadcasting Corp. of Charleston*, Memorandum Opinion and Order, 22 RR 1045, 1050 (1962) (existence of unexercised option to acquire outstanding voting stock was not sign of relinquishment of control of permittee); *GTE Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14059-69 (2000)). See also *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Eighth Report and Order, 17 FCC Rcd 2962, 2965-66 (2002) (in adopting exceptions to the controlling interest standard of 47 C.F.R. § 1.2110 (c)(2) fully diluted requirement, the Commission reasoned that, because put options leave the ownership decision in the designated entity’s control, they do not force an unwanted sale upon the designated entity). As the existence of an unexercised option is not indicative of a transfer of control, consequently, neither is its existence a *per se* violation of the Closed Broadcast Auction No. 25 participation requirements. Thus, there was no legal obligation to treat InterMart as ineligible to participate in the closed auction, nor conversely, to pronounce Citicasters the real party in interest, by virtue of an unexercised put option to sell the station.

<sup>53</sup> February 20, 2004 Woods Declaration at 1 (“the decision as to whether to ever exercise the put rests entirely in InterMart’s hands”). The Put Agreements grant to InterMart a put to require Citicasters to acquire each station.

<sup>54</sup> The Loan Agreements each provided that the loan may be prepaid “without premium or penalty” at any time prior to its due date.

<sup>55</sup> To the extent IWC and Astounding each argue that InterMart bears little financial risk under the LMAs, we note that this is a common feature of local marketing agreements, and that such agreements have been routinely allowed by the Commission. *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2787, *recon. granted in part*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387 (1992), *further reconsideration*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183 (1994).

placed itself in a very advantageous position vis-à-vis each new station: If InterMart desires to sell, it has a ready buyer.<sup>56</sup> On the other hand, if InterMart were to decide to retain the station, it can rely on Citicasters' financing, seek a new lender or use its own money. We reject IWC's and Astounding's invitation to second-guess the business decision that led InterMart to view this as an acceptable means to access the capital it needed to make its winning auction bids. Once each station is operating, and if the put is still in effect, InterMart states that it "will exercise its own independent business judgment to determine whether more profit will be made by maintaining ownership of the station, or conversely, by exercising the put. Thus, the future ownership of [each] station is not preordained."<sup>57</sup> Based on the foregoing, we find that IWC and Astounding have failed to show that the Bureau acted inconsistently with statute, regulation, case precedent, or established Commission policy, and thus, we deny the Applications for Review.

### III. CONCLUSION

16. For the foregoing reasons, the IWC Application for Review and the Astounding Application for Review ARE DENIED, and the IWC Petition for Reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>56</sup> It should be noted that Citicasters need not be the only possible buyer. If InterMart were to receive a third-party offer, it would be able to sell to the third party, subject to Citicasters's right to match the third-party offer.

<sup>57</sup> February 20, 2004 Woods Declaration at 2.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*In re Applications of Intermart Broadcasting Pocatello, Inc. and Intermart Broadcasting Twin Falls, Inc., File Nos. BPH-19970724M1 and BPH-19970731MX; and In re applications of Sharon Berlin Ingles, Powell Meredith Communications Company and TELNS Broadcasting Company, Inc., File Nos. BNP-20000128ACS, BNP-20000201AFN, and BMJP-20000201AEH*

I write separately to note my ongoing concern—which I first raised in 2001 in connection with the *Sinclair-Glencairn* matter—about the Commission’s approach to the type of “real party in interest” allegations raised in these cases. The question is whether a person other than the applicant will be in a position to *actually or potentially* control the operation of the applicant’s station. In making that determination, the Commission historically has examined whether the applicant has retained control over the station’s basic policies regarding programming, personnel, and finances.

It is not so much the standard itself but the *application* of the standard that gives me pause. These cases seem to have an air of unreality about them. They involve a wide range of potentially significant relationships—from the funding of auction bids to Local Marketing Agreements to Asset Purchase Agreements. Yet short of a written statement from the applicant stating “I hereby surrender control over my station’s programming, personnel and finances,” one gets the feeling that almost no combination of factors would cause this Commission to bat an eye.

It was not always so. In the past, the Commission has attached significance to the types of relationships at issue here. While I concur in the results based on the specific and limited facts before us, parties should be on notice that similar relationships could lead to a different result in the future. These cases are fact-specific and I, for one, will continue to approach them in that manner.